Filed 3/30/09 P. v. Scott, Young and Gray CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TAVARES COTLAND SCOTT, WESLEY IRA YOUNG and MARIO JIREH GRAY Defendants and Appellants.	G040888 (Super. Ct. No. RIF106722 O P I N I O N

Appeals from judgments of the Superior Court of Riverside County, Paul E. Zellerbach, Judge. Affirmed.

William R. Salisbury, under appointment by the Court of Appeal, for Defendant and Appellant Tavares Cotland Scott.

Michael B. McPartland, under appointment by the Court of Appeal for Defendant and Appellant Wesley Ira Young.

Nancy Mazza for Defendant and Appellant Mario Jireh Gray.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Sharon Rhodes and Rhonda Cartwright-Ladendorf, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

In a joint trial with three separate juries, defendants Tavares Cotland Scott, Wesley Ira Young, and Mario Jireh Gray were each found guilty of first degree murder, willful, deliberate and premeditated attempted murder, and shooting at an inhabited dwelling. (Pen. Code, §§ 187, 664/187 & 246; all further statutory references are to the Penal Code unless otherwise indicated.) On the murder count, each jury returned a true finding on the special circumstance allegation of intentional murder by an active participant in a criminal street gang. (§ 190.2, subd. (a)(22).) On both the murder and attempted murder counts, each jury also returned a true finding of discharge of a firearm by a principal causing death. (§ 12022.53, subds. (d) & (e)(1).) Finally, as to all three counts, each jury found defendants committed the offense for the benefit of a criminal street gang. (§ 186.22, subd. (b).) The trial court sentenced each defendant to a prison term of life without parole on count 1, life with parole on count 2, plus a consecutive term of 65 years to life on count 3 and the firearm discharge enhancements attached to counts 1 and 2.

On appeal, Scott challenges the trial court's admission of his prior uncharged criminal conduct. Gray challenges both the jury instructions on the natural and probable consequences doctrine and the sufficiency of the evidence to support

conviction under this theory. Both Gray and Young raise sufficiency of the evidence and instructional error claims as to the true findings on the special circumstance and firearm discharge allegations. Young claims the trial court erred in failing to stay the sentences imposed on counts 2 and 3 under section 654. Finally, pursuant to California Rules of Court, rule 8.200(a)(5), each defendant joins in the arguments raised by the other defendants to the extent it applies to him.

Although we discuss each argument in reference to the defendant asserting it, we reject all but Scott's attack on the admission of his prior uncharged acts. Further, we conclude this erroneous ruling did not result in prejudice and affirm the judgments in their entirety.

FACTS

On the evening of October 12, 2002, the Green family hosted a birthday party for their 16-year-old daughter Korteny and a friend at their home on Kilworth Drive. The party, consisting primarily of teenagers, was chaperoned by several adults, including Korteny's father, Terrence Green.

Although not invited to the party, Colby Williams, a member of the 94 Hoover Crips street gang (94 Hoover), Cedric Brewer, and two acquaintances attended it for a short time, arriving about 9:00 p.m. and leaving 30 minutes later. Pursuant to a plea agreement, Brewer testified for the prosecution at trial.

As the foursome left, they saw Bryan Williams arriving at the party. Colby Williams recounted an event several months earlier where he and several other 94 Hoover members, including Lewis Gray, defendant Gray's brother, were beaten up when they attempted to crash a party. Bryan Williams was one of the people at that party who assisted in repulsing the gang members.

Colby Williams telephoned Gray, a fellow 94 Hoover member, and informed him of Bryan Williams's whereabouts. Shortly thereafter, Brewer, Colby Williams, and the other members of their group met with defendants, several other 94 Hoover members, plus members of the Crips 9000, an affiliated gang, at a gas station a short distance from the Kilworth Drive residence. The group decided to return to the party purportedly to allow Lewis Gray to fight Bryan Williams one-on-one with the remaining members of the group helping out if someone else attempted to intervene. Brewer testified defendant Scott, a Crips 9000 member, displayed a semiautomatic handgun and declared, "In case something goes wrong, I have got this for backup."

The group returned to the Kilworth Drive residence. When the group approached the front door, several adults refused to allow them to enter the home. Green testified he approached defendant Gray and another young man who appeared to be the group's leaders, telling them to leave. Gray attempted to bypass Green, but Green stepped in front of him and asked, "what do you think you're doing?" Gray stepped back and began to reach towards the small of the other individual's back, but the latter slapped away Gray's hand.

Gray then said he was there to pick up his sister. Green entered the house, entered the garage, and asked the DJ to announce the sister's name and tell her to come to the front door. During this time, the three defendants and Lewis Gray ran around to the side of the house, jumping over the fence.

When no one responded to the DJ's announcement, Green began walking to the front door. He then heard Korteny scream, "Dad, Dad, they're in there fighting." Green reentered the garage and saw a group of people stomping on a man. Bryan Williams testified he was in the garage talking to the DJ when three to four males surrounded him, said "what's up" or "what set are you from," and began fighting with him. According to Brewer shortly after defendants and Lewis Gray disappeared around

the side of the house, he heard screaming, yelling, and sounds of a scuffle coming from the garage. On three occasions, he heard "people saying 'Hoover.'"

Green pulled the assailants off of Williams, announced the party was over, and opened the garage door. When the scuffling stopped, people began leaving the residence, including Lewis Gray and the three defendants.

As the garage door rose, Green saw the silhouette of a man squatting down on the grass area of the front yard holding one arm out in front of him. At that point, the man began firing a gun. Brewer testified he saw defendant Scott in the middle of the driveway shooting in the direction of the house. He began running back to Colby Williams's car. As he did so, he heard 9 or 10 shots fired from different guns. Colby Williams, Brewer, and the two others then left.

Kendayl Richburg, a party guest, testified she was in the garage during the fight. When the shooting began, Richburg ran upstairs and looked out a window facing the front of the house. She told a police officer that from this vantage point, she saw one of the individuals who had entered the garage and fought with Bryan Williams standing outside the house firing a gun in the direction of the garage. Richburg also told the officer she saw multiple flashes coming from different locations. At some point, Richburg saw a gunman look at her, point his gun in her direction and fire it. She either ducked down or was pulled down by someone. The bullet passed through the window, missing her. A second round was also fired through the window, striking a television.

Subsequent investigation of the crime scene determined that at least three different weapons were fired at the Kilworth Drive residence. The police found 3 .40-caliber shell casings just to the right of the driveway of the residence, 3 nine-millimeter shell casings behind a vehicle parked in front of the home to the right of the Kilworth Drive residence, and 8 .40-caliber shell casings in front of 2 homes located across the street. The police also recovered 9 bullets and found 11 bullet holes in the Kilworth Drive residence.

One party guest, 13-year-old Daveon Lee, died in the garage from a gunshot wound to the head.

DISCUSSION

1. The Uncharged Criminal Conduct Introduced Against Scott

a. Background

Before trial, the prosecution filed a motion to present evidence of four other shootings allegedly committed by Scott to establish identity, intent, absence of mistake, motive, and common scheme or plan. During a pretrial hearing, the court found some of these uncharged acts admissible on the issue of identity based on the prosecutor's representation that all of the shootings involved a .40-caliber handgun that was also used in the shooting at the Kilworth Drive residence, stating "the firearm used in these instances is extremely significant and constitutes a signature."

But before introduction of the uncharged acts evidence, the prosecutor informed the court and defense counsel that he had learned one uncharged shooting involved a nine-millimeter handgun, albeit one also used at the Kilworth Drive residence. The trial court allowed Scott's jury to hear testimony on three uncharged incidents because "even changing the caliber of the shell casings, . . . they still match . . . at least one of the . . . firearms that was used at the Kilworth [Drive] residence . . .," "[t]he theories of admissibility remain the same," and "the probative value" of the evidence "substantially outweigh[s] any prejudicial effect . . . ."

The testimony on the uncharged acts was as follows: On September 24, 2002, Todd Jones and a companion were sitting in Jones's parked car when a man approached and asked them, "Where you all from." Jones responded, "We don't gang bang . . . ." The man then reached for something in his pocket and demanded Jones get

out of the car. Jones drove away. As he did so, the man fired several shots at the vehicle. Jones identified Scott as the gunman at trial and chose his picture from a series of demonstrative photographs arrayed on a wall in the courtroom. The police found nine-millimeter shell casings at the scene. A criminalist compared the shell casings from this shooting with those found outside the Kilworth Drive residence and concluded the cartridges from both shootings were fired from the same weapon.

On September 28, Valarie Barnett and her 13-year-old son were hosting a house party to raise money for a children's dance group. At one point, Barnett's son turned away a group of young men because they did not have money to pay the required cover charge. About 15 minutes later, the group again approached the house and Barnett's son asked, "Do you have the money?" One man, who Barnett described as a "regular-sized guy," weighing "about 180 pounds," "light-skinned," "with two ponytails," said, "F you," pulled out a gun, and began shooting at Barnett's son. The police recovered both .40-caliber and nine-millimeter shell casings at the scene. A criminalist concluded the .40-caliber shell casings had been fired from a .40-caliber weapon also used at the Kilworth Drive residence.

On the evening of October 4, Norris Ellington and Saeed Galloway drove to a college campus to attend a party. As Ellington parked his new truck, a group of males walked past it. One of the men made a comment, pulled out a gun, and said, "Get out of the truck." Ellington paused for a second and the gunman walked up and shot him. When Ellington grabbed for his own weapon and tried to get out of the truck another person shot him in the back. Ellington was unable to provide a description of the first assailant. Galloway did not get a good look at him either, but told the police the first gunman was a "light-skinned [B]lack male with braided hair" that included two "twisties," standing "about five nine, five ten," and weighing 160 pounds. Again, a criminalist concluded .40-caliber shell casings recovered from this incident were fired by the same gun used in the shooting at the Kilworth Drive residence.

b. Admissibility of the Prior Uncharged Acts

While "evidence of a person's character or trait of his . . . character . . . is inadmissible when offered to prove his . . . conduct on a specified occasion[]" (Evid. Code, § 1101, subd. (a)), "evidence that a person committed a crime . . . or other act" may be introduced "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) . . . " (Evid. Code, § 1101, subd. (b)). "Like other circumstantial evidence, admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence *vel non* of some other rule requiring exclusion. [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 705, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion. [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1147.)

First, Scott challenges the sufficiency of the evidence to establish he perpetrated the uncharged criminal acts. But the evidence sufficed to support an inference he committed the other three shootings. Jones identified Scott in court and chose his picture from the courtroom photograph array of the Kilworth Drive shooting participants. Barnett and Galloway gave descriptions of the shooter similar to Scott's booking information, "male [B]lack, five-eight, 180 [pounds], medium build, hair black, eyes brown." In addition, the trial judge noted Scott was "a light-skinned [B]lack male," and when the Kilworth Drive shooting occurred, he wore "his hair . . . with two long ponytails."

Next, he claims the trial court erred by allowing "the prosecution [to] introduce evidence of uncharged crimes to prove identity, because these [shootings] did not share enough distinctive characteristics with the charged crimes." Scott correctly notes the admission of uncharged criminal conduct to prove identity "must share common

features that are sufficiently distinctive . . . 'as to be like a signature.' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) The People cite the identification of Scott by the witnesses to the uncharged acts and the fact both of the weapons used in committing them were also used at the Kilworth Drive residence. But given the differing circumstances of the prior acts and the fact the prior acts involved the use of two different weapons, neither of which was directly traced to Scott, these similarities fail to share sufficiently distinctive common features to support the use of the prior conduct to identify Scott as one of the gunmen on the charged crimes. (Compare *People v. Medina* (1995) 11 Cal.4th 694, 748-749.)

While the pretrial hearing focused on the issue of identity, as noted, the trial court ultimately admitted the uncharged criminal conduct on the other grounds cited by the prosecution. Before the testimony on Scott's uncharged criminal conduct was admitted, the trial court instructed the jury, "[i]f you decide . . . the defendant committed the uncharged offenses, you may . . . consider that evidence for the limited purpose of deciding whether or not the defendant was the person who committed the offenses alleged in this case, that the defendant acted with a similar intent that is required to prove the alleged offenses in this case, that the defendant had a motive to commit the offenses alleged in this case, the defendant had certain knowledge that would be required to prove the offenses alleged in this case . . ., or that the defendant had a common plan or scheme to commit the offenses alleged in this case."

Scott contends his failure to seriously dispute the issues other than identity relieved the prosecution of its burden of proof on them and therefore none of those issues could be proved by the earlier crimes. Not so. "By pleading not guilty, defendant placed all the elements of the [charged crimes and related allegations] in dispute at trial. [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 23; see also *People v. Daniels* (1991) 52 Cal.3d 815, 857-858, fns. omitted ["unless the defendant has taken some action to narrow the prosecution's burden of proof," his "plea . . . put[s] the elements of the

crime in issue for the purpose of deciding the admissibility of evidence under Evidence Code section 1101"].) Scott never conceded the sole issue before the jury was his identification as one of the gunmen at the Kilworth Drive residence shooting.

The inquiry "Where you all from" during the first uncharged shooting incident suggests Scott's act was gang-motivated and arguably might be admissible to show he acted with the same motivation in firing a weapon at the Kilworth Drive residence. Case law has recognized that in the criminal street gang subculture, the inquiry "Where are you from?" often precedes gang-related violence. (*People v. Martinez* (2008) 169 Cal.App.4th 199, 211.) There is evidence a similar inquiry preceded the attack on Bryan Williams in this case. Further, unlike other grounds for admitting uncharged conduct "'the intermediate fact of motive' may be established by evidence of 'prior dissimilar crimes[]' . . . for the evident reason that the motive for the charged crime arises simply from the commission of the prior offense. [Citation.]" (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018.) Thus, "[a]s long as there is a direct relationship between the prior offense and an element of the charged offense, introduction of that evidence is proper. [Citations.]" (*People v. Daniels, supra,* 52 Cal.3d at p. 857.)

The second uncharged incident arguably was admissible under a common plan or scheme theory. "Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 394, fn. 2.) Unlike uncharged conduct admitted to prove identity, to be admissible for "a common design or plan" theory, "evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citation.]" (*Id.* at p. 402.) In each case the evidence supported a finding that Scott, in the company of others, began firing a weapon when rebuffed in an attempt to enter a residence to attend a party.

But the third uncharged shooting was not admissible on any permissible ground. Other than the fact Scott was with a group of persons, there was no evidence suggesting the shooting was gang related. The incident appears to have involved an opportunistic attempted carjacking and thus lacked the concurrence of common features necessary to support its admission on a common scheme or plan theory. While it arguably showed Scott fired a gun with the intent to kill, the issue of intent was not seriously disputed in this case. "'The act of firing toward a victim at a close . . . range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." [Citation.]' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 741.) In light of this rule, evidence of another shooting at close range to show an intent to kill would be merely cumulative.

Scott also claims the trial court erred by admitting the uncharged acts because the prejudicial effect of the evidence outweighed its probative value. "'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have *substantial* probative value.' [Citation.]" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404; see also Evid. Code, § 352 ["The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice"].) Again, we review the trial court's ruling under an abuse of discretion standard. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.)

The factors relevant to the probative value of uncharged criminal conduct include "'the tendency of that evidence to demonstrate the existence of' the fact for which it is being admitted," "the extent to which the source of the evidence is independent of the evidence of the charged offense, the amount of time between the uncharged acts and the charged offense and whether the evidence is 'merely cumulative regarding an issue that was not reasonably subject to dispute.' [Citations.]" (*People v. Walker* (2006) 139 Cal.App.4th 782, 806.) As for the prejudice arising from this

evidence, courts consider "whether the uncharged acts resulted in criminal convictions, thus minimizing the risk the jury would be motivated to punish the defendant for the uncharged offense, and whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses. [Citations.]" (*Ibid.*)

This issue presents a close case. Two of the uncharged acts had some relevance to show either motive or the existence of a common plan. All of the uncharged acts occurred within three weeks before the shooting at the Kilworth Drive residence, and none of the witnesses to the prior shootings were eyewitnesses to the latter incident. Nor was the testimony concerning these incidents more inflammatory than the evidence of the charged crimes. But Scott was never convicted of committing the prior uncharged criminal acts. Further, except for the first uncharged act, the identification of Scott as the gunman was equivocal.

But, as discussed below, even if the trial court erred by admitting any or all of the uncharged conduct evidence, the ruling amounted to only harmless error.

c. Prejudice

Citing the length of jury deliberations, exceeding 17 hours over three days, plus the numerous questions and requests for readbacks of trial testimony, Scott contends his prosecution involved a close case, thereby rendering any error in the admission of the uncharged criminal conduct prejudicial under both state and federal law.

The state law standard of review in this circumstance is whether "it is . . . reasonably probable that a result more favorable to defendant would have resulted had the prior crimes evidence not been admitted. [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1195; see also *People v. Leon* (2008) 161 Cal.App.4th 149, 169.) Where the erroneous admission of evidence violates a defendant's federal constitutional rights, the question is whether "any error was harmless beyond a reasonable doubt. [Citations.]" (*People v. Cole, supra,* 33 Cal.4th at p. 1195.)

"'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right[s] . . . .'" (*People v. Cudjo* (1993) 6 Cal.4th 585, 611; see also *People v. Lindberg*, *supra*, 45 Cal.4th at p. 26 ["We have long observed that '[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a . . . defendant's constitutional rights'"].) To support the application of the federal harmless beyond a reasonable doubt standard of harmless error, "the [erroneous] admission of evidence . . . under state law" must render "the trial *fundamentally unfair*. [Citations.] Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional . . . test" of "whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

The erroneous admission of evidence concerning Scott's uncharged acts was harmless under either test. In addition to Brewer, numerous witnesses who attended the Kilworth Drive party or who were nearby the residence when the gang members arrived identified Scott, or a person fitting his description, or chose his photograph as one of the persons present at the residence when the shooting occurred.

The prosecutor used the prior uncharged acts to argue Scott was one of the gunmen and fired his weapon with the intent to kill. Defense counsel conceded the latter fact, describing Daveon Lee's murder as "senseless" and telling the jury "I am not going to insult your intelligence by saying whoever was shooting into that garage didn't mean . . . to kill anyone." But as discussed in greater detail below, even if Scott was not one of the shooters, he could still be convicted on the basis he either conspired with the other gang members or aided and abetted them in carrying out the assault on Bryan Williams. In rebuttal, the prosecutor argued, "Who had the guns? . . . I don't have to prove that, . . . it doesn't matter. It's the same. If he agreed to go down there to commit that assault on Bryan Williams, and one . . . of the reasonable consequences would be death,

he is on the hook for that." Thus, identifying Scott as one of the gunmen was not essential to his conviction in this case.

Scott cites case law suggesting the erroneous introduction of uncharged criminal acts is so prejudicial that, when admitted, a defendant's conviction is all but assured. But the jury deliberated for more than 17 hours over a three-day period. During deliberations, the jury made numerous requests to rehear testimony, primarily from witnesses present at the Kilworth Drive residence who either identified Scott or testified to seeing someone fitting his description when the fighting and shooting occurred. The jury also sought further instruction on the definitions of first and second degree murder and the natural and probable consequences doctrine. Thus, the admission of the prior acts evidence did not render this an open and shut case. Scott's jury, far from stampeding to verdict, was careful and deliberate and by all appearances, the antithesis of a prejudiced fact finder.

Acknowledging the length of deliberations and the jury's questions and requests to rehear testimony, Scott alternatively argues this prosecution involved a close case, thereby rendering any error in admitting the uncharged criminal acts as prejudicial. But merely because the jury deliberated for some time does not suffice to show a close case. This case involved the joint trial of three defendants before three separate juries that lasted over two months, and involved testimony by more than 50 witnesses and numerous exhibits. *People v. Houston* (2005) 130 Cal.App.4th 279 recognized "the length of a jury's deliberation is related to the amount of information presented at trial . . . ." (*Id.* at p. 301.) Thus, "[t]he jury's deliberation of this mass of information over the course of [several] days speaks only for its diligence." (*Ibid*.) "Additionally, we [must] assume that the jury spent time going over their instructions to make sure that they were properly carrying out their duties." (*People v. Walker* (1995) 31 Cal.App.4th 432, 438.)

The same is true for the jury's questions and requests for testimony readbacks. "[R]equests for the reading back of selected testimony do[] not necessarily

indicate that this was a 'close' case as appellant argues; in fact, the jury's time spent reviewing that testimony reduced their time spent actually deliberating. [Citation.]" (*People v. Houston, supra,* 130 Cal.App.4th at p. 301.) As noted, the jury's questions dealt with the definitions of first and second degree murder and application of the natural and probable consequences doctrine, and its requests to rehear testimony focused on those eyewitnesses who identified Scott as being present at the Kilworth Drive residence when the shooting occurred. Todd Jones, who positively identified Scott in person in court and by his photograph, was the only prior uncharged act witness whose testimony the jury requested to rehear. Given the trial's length, the amount of evidence to review, the nature of the prosecution, plus the added delays involved in a joint trial with multiple juries, the length of deliberations was understandable.

"In short, to conclude that this was a 'close case' in light of the jury's actions 'in the absence of more concrete evidence would amount to sheer speculation on our part. Instead, we find that the length of the deliberations could as easily be reconciled with the jury's conscientious performance of its civic duty, rather than its difficulty in reaching a decision.' [Citation.]" (*People v. Houston, supra,* 130 Cal.App.4th at p. 301, quoting *People v. Walker, supra,* 31 Cal.App.4th at p. 439.) Thus, we conclude Scott has failed to show the erroneous admission of uncharged criminal acts caused him prejudice.

2. Application of the Natural and Probable Consequences Doctrine

a. Background

The trial court instructed the juries that defendants could be found guilty of murder, attempted murder, and shooting at an inhabited dwelling on theories they either conspired with or aided and abetted the perpetrators in committing the crimes of aggravated assault or battery if it concluded the charged crimes were the natural and probable consequence of the target offenses. Gray contends: (1) the trial court erred by "instructing the jurors that a battery was a possible target offense" justifying "the

natural and probable consequence instruction[]," and (2) the evidence "did not support a[] . . . conclusion that the murder, attempted murder, or shooting into an inhabited home was a natural and probable consequence of aiding and abetting an assault or battery." Both arguments lack merit.

b. Battery as a Target Offense

Describing the crime of battery as "one of the least serious offenses in the Penal Code," Gray contends "it cannot be concluded that intending to aid and abet a battery would warrant a conclusion that murder, attempted murder, and shooting at an inhabited house would be a natural and probable consequence . . . ." Case precedent supports a contrary conclusion.

"[A] defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." (*People v. Prettyman* (1996) 14 Cal.4th 248, 261.) The same principle applies under the law of conspiracy for the acts of a coconspirator. (*People v. Hardy* (1992) 2 Cal.4th 86, 188.)

"In determining whether the crime committed by a confederate was the natural and probable consequence of a crime aided and abetted by the defendant, the inquiry is strictly objective, and does not depend on the defendant's state of mind as to the confederate's crime. . . . '[T]he issue . . . depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant.' [Citation.]" (*People v. Caesar* (2008) 167 Cal.App.4th 1050, 1058.)

In *Prettyman*, the Supreme Court recognized "application of the 'natural and probable consequences' doctrine" requires "a close connection between the target crime aided and abetted and the offense actually committed." (*People v. Prettyman*,

supra, 14 Cal.4th at p. 269.) Thus, the court held, it is "[r]arely, if ever, . . . true" "that an aider and abettor can 'become liable for the commission of a very serious crime' committed by the aider and abettor's confederate even though 'the target offense contemplated by his aiding and abetting may have been trivial.'" (*Ibid*.)

Nonetheless, cases have upheld convictions for murder or attempted murder where the jury was instructed a defendant's liability could result from aiding and abetting an assault or a battery. (*People v. Caesar, supra,* 167 Cal.App.4th at pp. 1056-1057 [attempted murder conviction based on assault and battery target offenses]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 10-11 [murder conviction based on the nonperpetrator defendants aiding and abetting assault involving fistfight].) Even the recent decision in *People v. Martinez* (2008) 169 Cal.App.4th 199, which held the evidence failed to support a finding the crimes of murder and attempted murder were the natural and probable consequences of a gang member's "'Where are you from?' challenge," "emphasize[d] that [its] analysis is necessarily limited to the evidence presented in the case before [it]." (*Id.* at p. 214.)

In *People v. Montes* (1999) 74 Cal.App.4th 1050 we affirmed a criminal street gang member's conviction for attempted murder, assault with a deadly weapon, and other crimes, rejecting his claim the trial court erred by instructing the jury he could be convicted if it found he aided and abetted a simple assault or breach of the peace by fighting with rival gang members in public. Acknowledging the Supreme Court's admonition about imposing criminal liability for a serious crime based on the defendant's aiding and abetting a "trivial" offense, we held "[u]nder the circumstances presented in this case, the targeted offenses . . . were not trivial. They arose in the context of an ongoing rivalry between [street gangs] during which the two gangs acted violently toward each other. This feud spilled over on the night in question when Montes and his gang confronted Garcia in the parking lot. From the start, the confrontation was punctuated by threats and weaponry. And when it was clear the chain-wielding Montes and his gang

were too much for Garcia, Flores shouted something about a gun, which in turn prompted Cuevas to obtain a firearm and shoot Garcia." (*Id.* at p. 1055.)

In so ruling, this court declined to follow *People v. Butts* (1965) 236 Cal.App.2d 817, a case on which Gray places heavy reliance. "*Butts*['s] require[ment that] one accused of aiding and abetting . . . know of and encourage the perpetrator's intended use of a weapon . . . is out of step with Supreme Court authority," and its holding the "remnant of a different social era, when street fighters commonly relied on fists alone to settle disputes. . . . No one immersed in the gang culture is unaware of these realities, and we see no reason the courts should turn a blind eye to them." (*People v. Montes, supra,* 74 Cal.App.4th at p. 1056; see also *People v. Gonzales, supra*, 87 Cal.App.4th at pp. 9-10 [prosecutor not required to present evidence defendants knew shooter intended to use his gun].)

Gray erroneously assumes the relatively minor punishment attached to the crime of battery renders it a "trivial" offense. But, as noted in *Montes*, in cases involving retaliatory actions by criminal street gangs, a categorical conclusion the crimes of murder, attempted murder, and shooting at an inhabited dwelling cannot be the natural and probable consequences of a misdemeanor battery inappropriately minimizes the gravity and nature of the latter offense. Thus, we conclude the trial court properly instructed the jury on the crime of battery as a target offense.

c. Sufficiency of the Evidence

Alternatively, Gray challenges the sufficiency of the evidence to support his conviction as an aider and abettor on a natural and probable consequences theory, contending the evidence showed he merely "aided and abetted a fist fight[] between unarmed combatants."

"'Whether the act committed was the natural and probable consequence of the act encouraged and the extent of defendant's knowledge are questions of fact for the

jury. [Citations.]' [Citations.]" (*People v. Durham* (1969) 70 Cal.2d 171, 181, italics omitted; see also *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) "'"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' [Citation.] We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. [Citation.] We may reverse for lack of substantial evidence only if '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' [Citation.]" (*People v. Hoang* (2006) 145 Cal.App.4th 264, 275.)

Contrary to Gray's interpretation of the evidence, the testimony reflected defendants knew about the presence of firearms, and the likelihood of both their use and the deadly consequences of it were foreseeable in this case. Defendants and fellow and affiliated gang members went to the party to inflict a beating on Bryan Williams for his participation in repulsing the attempt by Lewis Gray and other gang members to crash a party, not merely to officiate a one-on-one fistfight. The prosecution's gang expert testified "when you are involved in a gang fight, it's not just one person hitting, it's a whole slew of people hitting . . . ." Gray acknowledges several partygoers testified that when he, the other defendants, and Lewis Gray entered the garage at least one of them had a handgun in his waistband. The assailants surrounded Bryan Williams and simultaneously began striking him while yelling "Hoover."

Furthermore, when the gang members met at the nearby gas station before the attack, Scott displayed a gun and declared it would be available for use "in case something goes wrong . . . ." Again, the gang expert testified that phrase "could [mean] a variety of things," including "if other people try to intervene, you have the guns to not only intimidate . . . that person, but [to] take care of them, you know, kill them, if you have to," "[o]r if things just don't go the way you want, if . . . we didn't beat them

enough . . . now we are going to kill them." That is exactly what occurred here. Gray acknowledges the attack on Bryan Williams did not result in any serious injury to him, no doubt due to Green's quick action in breaking up the fight. It was then that the gunfire erupted.

Under these circumstances, assuming the jury did not find any of the defendants used a firearm in the Kilworth Drive shooting, their convictions for the charged crimes as either coconspirators or aiders and abettors on a natural and probable consequences theory is supported by the evidence.

3. Section 190.2, Subdivision (a)(22) Special Circumstance Finding

Each jury returned a true finding as to the special circumstance contained in section 190.2, subdivision (a)(22). It declares "[t]he penalty for a defendant found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if . . . : [¶] . . . [¶] (22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang . . . and the murder was carried out to further the activities of the criminal street gang." (§ 190.2, subd. (a)(22).)

Young and Gray challenge the validity of the finding. Both argue that since this special circumstance expressly applies where "[t]he defendant intentionally kill[s] the victim," the trial court erred by instructing the jury it could find the special circumstance true without finding either defendant was the actual killer. Alternatively, Young claims the trial court committed instructional error by giving CALCRIM No. 702 because that instruction "did not require the jurors to find . . . a defendant who was not the actual killer had aided[and] abetted . . . the perpetrator in the commission of murder in the first degree." (Underscoring omitted.) Finally, Gray challenges the sufficiency of the evidence to support a finding of the essential element that he acted with the intent to kill.

a. Applicability of Special Circumstance to an Aider and Abettor

As for their attack on the applicability of the intentional murder by gang member special circumstance, defendants point out the difference in phrasing used in the various special circumstances covered by subdivision (a) of section 190.2. They note some of the special circumstances refer to how a murder was committed, others rely on the stature of the murder victim, while some, including subdivision (a)(22), refer to "[t]he defendant." This interpretation of the statute lacks merit.

"'In construing . . . statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration. [Citations.] "We are mindful that the goal of statutory construction is ascertainment of legislative intent so that the purpose of the law may be effectuated."' [Citation.]" (*Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 989.) "'In determining such intent, we begin with the language of the statute itself. [Citation.] That is, we look first to the words the Legislature used, giving them their usual and ordinary meaning.' [Citation.]" (*People v. Standish* (2006) 38 Cal.4th 858, 869.) "If the language contains no ambiguity, we presume the Legislature meant what it said, and the plain meaning of the statute governs. [Citation.]" (*People v. Robles* (2000) 23 Cal.4th 1106, 1111.)

Defendants' argument ignores subdivision (c) of section 190.2. It declares, "Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true . . . ." (§ 190.2, subd. (c).)

As Young acknowledges, the Supreme Court rejected an analogous statutory claim in *People v. Bonilla* (2007) 41 Cal.4th 313. There the defendant was convicted of first degree murder with a lying-in-wait special circumstance finding. The evidence reflected the defendant committed the crime with two coconspirators who

actually killed the victim. The defendant challenged the special circumstance finding because it required "'the defendant kill' the victim." (*Id.* at pp. 330, 331.) The Supreme Court concluded, "[t]he . . . argument rests on a misapprehension of the law." (*People v. Bonilla, supra*, 41 Cal.4th at p. 330.) Citing the language of former section 190.2, subdivision (b), now found in subdivision (c), the court held "[w]e decline to attach special significance to the choice of the words 'the defendant,' as opposed to 'the killer' or 'the murderer,' where to do so would negate in whole or in part another statutory provision. Had murder by lying in wait been intended to be omitted from the list of special circumstances that could extend to aiders and abettors, former subdivision (a)(15) would have been excluded from the list in former subdivision (b) . . . ." (*Id.* at p. 331.) The same analysis applies to this case as well.

b. Instructional Error

Young's alternative statutory argument is that under section 190.2, subdivision (c), one "who is not the actual killer" must have "aided and abetted a first degree murder" (*ibid*.) to support a true finding on the special circumstance, and here, contrary to this requirement, he "was prosecuted for murder on the theories that he either aided and abetted or conspired to commit an aggravated assault or misdemeanor battery . . ., the natural and probable consequences of which were first degree murder . . . ."

Section 31 declares, "All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." As noted above, case law has long recognized "'[a]n aider and abettor's derivative liability for a principal's criminal act has two distinct prongs: First, the aider and abettor is liable for the particular crime that to his knowledge his confederates are contemplating. Second, the aider and abettor is also liable for the natural and probable consequences of any criminal act he knowingly and intentionally aids and abets . . . .'" (*People v. Karapetyan* (2006) 140

Cal.App.4th 1172, 1178; see also *People v. Prettyman, supra,* 14 Cal.4th at p. 260.) Consequently, "an aider and abettor 'shares the guilt of the actual perpetrator.' [Citation.]" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1122.) Young fails to cite any authority for his theory section 190.2, subdivision (c) applies only to one who aids and abets a first degree murder as opposed to one who aids and abets another crime of which the commission of first degree murder is the natural and probable consequence. Had the Legislature or electorate intended to limit this subdivision to aiders and abettors found guilty of the intended crime, it would have made that limitation clear.

Young and the other defendants were tried for deliberate and premeditated murder on the theory this crime was the natural and probable consequence of their either aiding and abetting or conspiring to commit the crimes of aggravated assault and battery. The trial court properly instructed the jury on the elements of first degree murder and what the prosecution needed to establish to convict a person of that crime as either an aider and abettor or as a coconspirator. It also properly gave CALCRIM No. 702 which told the jury that "to prove this special circumstance for a defendant who is not the actual killer but who is guilty of first degree murder as an aider and abettor or as a member of a conspiracy, the People must prove that the defendant acted with the intent to kill."

Young attacks the latter instruction on the ground "this instruction . . . did not require the jurors to find that a defendant who was not the actual killer had aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the perpetrator in the commission of the murder . . . ." (Underscoring omitted.) But since the jury is assumed to be "'capable of understanding and correlating the instructions'" given to them (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148), an appellate court determines the correctness of jury instructions, not by a single instruction, but rather from the entire charge given. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Under this approach, the absence of a necessary element in one instruction can be provided by

another or in light of all of the instructions. (*Ibid*.) Consequently, Young's instructional error argument as to the special circumstance allegation lacks merit.

c. Sufficiency of the Evidence

Finally, Gray contends the evidence fails to support a finding he harbored the intent to kill necessary to support the jury's true finding as to the special circumstance allegation. "[W]e review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a rational trier of fact could find the essential elements of [a] . . . special-circumstance allegation beyond a reasonable doubt. [Citation.]" (*People v. Lindberg, supra,* 45 Cal.4th at p. 37.) In applying this standard "[w]e do not reweigh evidence or reassess a witness's credibility. [Citation.]" (*Id*. at pp. 37-38)

Repeating his assertion the evidence showed only a plan "to engage in a fist fight with" Bryan Williams, Gray argues "there was no plan to shoot," or evidence "that he encouraged the shooters to shoot," or even a "reason for anyone to shoot in the situation as it developed." But, in light of the evidence summarized in part 2. c. above, we conclude defendants, as active members of a violent street gang who participated in an attempt to inflict a retaliatory beating with knowledge guns were available for use and would be employed if the beating did not proceed as planned, acted with the requisite intent to kill. (*People v. Woods* (1991) 226 Cal.App.3d 1037, 1048-1049.)

4. Firearm Discharge Enhancement

a. Introduction

Subdivision (d) of section 12022.53 imposes "an additional and consecutive term of imprisonment in the state prison for 25 years to life" on "any person who, in the commission of a [murder or attempted murder] . . ., personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or

death . . . ." (§ 12022.53, subds. (a)(1) & (18), (d).) Under subdivision (e) of the statute, "Th[is] enhancement[] . . . shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision . . . (d)." (§ 12022.53, subd. (e)(1).)

The trial court instructed the jury on the firearm discharge enhancement using CALCRIM 1402. The introductory sentence of the instruction was amended to state as follows: "If you find the defendant guilty of the crimes charged in Counts 1 or 2, and you find that the defendant committed those crimes for the benefit of, at the direction of, or in association with a criminal street gang, with the intent to promote, further, or assist in any criminal conduct by gang members, you must then decide whether . . . the People have proved the additional allegation that one of the principals personally and intentionally discharged a firearm during that crime and caused death."

Young attacks the true finding on this enhancement, contending the trial court committed instructional error and the evidence fails to support the jury's finding. Each claim lacks merit.

b. Instructional Error Claim

Young first argues the trial court erred when instructing the jury on this enhancement because the instruction given "did not require the jury to find [he] was a principal in the murder and attempted murder offenses . . . ." (Underscoring omitted.) In support of this argument, he asserts that since he was convicted of murder and attempted murder "based on a finding that he aided and abetted or conspired to commit a lesser crime, the natural and probable consequences of which was murder or attempted murder, the verdicts" on those charges "did not show . . . he was a principal in those offenses." (Underscoring omitted.)

The introductory sentence of the court's instruction limited the enhancement's application to only one found guilty of the charged offenses of murder and attempted murder. Thus, the court did instruct the jury each defendant had to have been a principal in committing those crimes to be subject to the enhancement.

Furthermore, as discussed above, the prosecution's aider and abettor and conspiracy theories of liability do not preclude application of the firearm discharge enhancement. The term principal includes "[a]ll persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission . . . ." (§ 31.) Thus, "an aider and abettor 'shares the guilt of the actual perpetrator.' [Citation.]" (*People v. Mendoza, supra,* 18 Cal.4th at p. 1122.) The mere fact the evidence showed defendants aided and abetted or conspired to commit the uncharged target crimes of aggravated assault and battery does not support a conclusion they were not principals in the commission of the charged crimes of murder and attempted murder.

c. Sufficiency of the Evidence

Young also claims "there was insufficient evidence that a principal in the attempted murder offense discharged a firearm that caused the death during the commission of that offense . . . ." He argues, "The evidence was that the perpetrator of the attempted murder of Richburg fired gunshots at the upstairs bedroom window, and then this offense was complete. There was no evidence that the perpetrator of the attempted murder of Richburg missed his target so badly that the shots with which he was trying to hit Richburg entered the garage and struck Lee."

"We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. [Citation.]" (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1058.) "Our role in considering an insufficiency of the evidence claim is quite limited. We do not reassess the credibility of witnesses [citation],

and we review the record in the light most favorable to the judgment [citation], drawing all inferences from the evidence which supports the jury's verdict. [Citation.] By this process we endeavor to determine whether '"*any* rational trier of fact"' could have been persuaded of the defendant's guilt. [Citations.]" (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.)

The premise of Young's argument is that for the enhancement to apply to the attempted murder conviction, one of the bullets fired at Richburg, the victim of that charge, also had to have struck Lee, the victim of the murder charge. He cites no authority for his narrow interpretation of the statute, and the case law has given it a broader construction.

Section 12022.53, subdivision (d) applies to one "who . . . personally and intentionally discharges a firearm and proximately causes . . . death . . . ." Section 12022.53, subdivision (e) extends the enhancement created by subdivision (d) of the statute to "any person who is a principal in the commission of an offense" where that person violates "subdivision (b) of Section 186.22," and "[*a*]*ny* principal in the offense committed *any* act specified in subdivision . . . (d)."

In *People v. Zarazua* (2008) 162 Cal.App.4th 1348, the court held subdivision (d) applied to two defendants convicted of murder who fired guns at a car carrying rival gang members, causing the car to run a stop sign and strike another car, killing one of the latter vehicle's occupants. The court declared subdivision (d) of "[t]he statute applies, by its terms, to personal and intentional discharge of a firearm which 'proximately causes . . . death.' [Citation.] The Legislature could have, but did not, state that the statute applies when a defendant shoots someone, causing that person's death. Instead, the statute is worded much more broadly, setting up proximate cause as the required nexus between the personal discharge and the death. [Citation.]" (*People v. Zarazua, supra*, 162 Cal.App.4th at p. 1360.)

At trial, the prosecution presented evidence the police used a laser to retrace the trajectory of bullet holes in the garage and the bullet that passed through the upstairs window and struck the television in the bedroom. This evidence reflects one gunman who had fired into the garage also fired at least one of the rounds aimed at Richburg. Furthermore, the evidence reflects the shootings that resulted in Lee's death and the attempt on Richburg's life occurred simultaneously during the same gang attack involving the use of multiple weapons. Since the evidence supports a finding defendants aided and abetted all of the gunmen, even if one assumes different persons fired the bullets that killed Lee and narrowly missed Richburg, the evidence suffices to support each jury's true finding on the firearm discharge enhancement imposed on defendants' convictions for attempted murder.

5. Section 654

Again relying on the prosecution's theories of liability, Young contends the trial court violated section 654 by failing to stay the sentences imposed for counts 2 and 3. While acknowledging the multiple victims of violent crimes exception to the statute, Young claims "he only aided and abetted or conspired to commit an assault and battery on Bryan [Williams], at most a violent act against a single person." This argument lacks merit as well.

Section 654, subdivision (a) declares "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The statute applies not only to a single act resulting in multiple convictions, but also to a course of conduct violating more than one criminal statute if all of the offenses are incident to a single objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) But the statute "does

not . . . preclude multiple punishment when the defendant's violent act injures different victims. [Citations.]" (*People v. DeLoza* (1998) 18 Cal.4th 585, 592.)

As discussed above, defendant was convicted as a principal for the murder of Lee, the attempted murder of Richburg, and the shooting at the Kilworth Drive residence. The crimes of murder (see *Neal v. State of California, supra,* 55 Cal.2d at p. 20; *People v. Hall* (2000) 83 Cal.App.4th 1084, 1089 ["an act of violence committed against a person . . . qualifies for the multiple-victim exception"]), attempted murder (*People v. Oates* (2004) 32 Cal.4th 1048, 1063), and shooting at an inhabited dwelling (*People v. Cruz* (1995) 38 Cal.App.4th 427, 434-435) constitute crimes of violence for purposes of the multiple victim exception. Therefore, defendant's reliance on section 654 prohibition against multiple punishment is unavailing.

DISPOSITION

The judgments are affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.